STATE OF MICHIGAN

COURT OF APPEALS

In re CODY THOMAS BENNETT, Minor.

BRUCE CRANHAM, Guardian ad litem,

Petitioner-Appellee,

v

CODY THOMAS BENNETT,

Respondent-Appellant.

UNPUBLISHED
July 16, 1999

No. 215809
Chippewa Circuit Court
Family Division
LC No. 98-012045 DL

Before: Whitbeck, P.J., and Markman and O'Connell, JJ.

PER CURIAM

Respondent appeals as of right an order that placed him under the supervision and control of the family division of the circuit court based on a finding of juvenile delinquency under MCL 712A.2(a)(3); MSA 27.3178(598.2)(a)(3), often referred to as the "incorrigibility" ground of delinquency. We reverse.

I. Factual Background And Procedural History

Underlying the regrettable circumstances of this case is a contentious custody dispute between the parents of respondent. We note that respondent was ten-years-old at the time of the alleged acts of "incorrigibility" and at the time of the juvenile delinquency proceedings below.[1] A custody order entered in a separate circuit court action between respondent's parents, and undisputedly in force at the time pertinent to this case, is included in the lower court record. Generally, this custody order provided for respondent's father to have primary physical custody of respondent, with respondent's mother to have broad and well-delineated "parenting time," commonly referred to as visitation rights.

In a petition filed on August 4, 1998, Bruce Cranham, who had been appointed to act as guardian ad litem for respondent, alleged that respondent was "incorrigible" in that:

> On or about July 1998, in Rudyard Township, Chippewa County, MI, said juvenile:
>
> Is a child who is repeatedly disobedient to the reasonable and lawful commands of his/her [] parents, guardian, or custodian, to-wit: disobeys house rules and/or visitation order.

An attachment to the petition stated the allegations against respondent with more particularity:

> There have been ongoing custody, parenting disputes between [respondent's] parents which have occurred over several years. Petitions have been filed recently, the undersigned [Cranham] has been appointed as attorney/guardian ad litem for [respondent]
>
> An Order entered by the Circuit Court on August 18, 1997 [copy attached] granted [respondent's father] primary physical custody of [respondent] and [respondent's mother] specific parenting time. This parenting time included ten weeks in the summer months.
>
> The ten week parenting time expired this year on July 24, 1998.
>
> [Respondent] has informed the undersigned he will not reside with his father[.] In addition [respondent] has refused his father's commands that he reside with him. In spite of [respondent's] statements to the contrary, the undersigned views his father's commands as reasonable and lawful because they are consistent with and based on the Court Order.

A delinquency proceeding based on this petition was held in the family court on October 2 and 30, 1998. At that proceeding, Cranham indicated in his testimony that respondent had, at one meeting between the two of them a few days before respondent's father was scheduled to resume physical custody of respondent, "made it very clear to [Cranham], in no uncertain terms, he had no intention of obeying" the circuit court order in the custody case that provided for respondent to be returned to his father's physical custody in July 1998, at the end of the block of summer parenting time awarded to respondent's mother.

Respondent's father testified at the delinquency proceeding that July 24, 1998 "was the day [respondent] was supposed to come back from visitations with [respondent's mother] to live with, to be with us [presumably referring to himself, respondent's father, and respondent's stepmother]."[2] According to the testimony of respondent's father, respondent was to have returned home at 5:00 p.m. on that day, but "he never showed up." Respondent's father further testified that he had, previous to July 24, 1998, "asked [respondent] to please come home, you know, without any hassles, on that day, like he was supposed to" and that respondent replied "he was gonna and that wasn't going to be a problem."

The trial court found that respondent had violated MCL 712A.2(a)(3); MSA 27.3178(598.2)(a)(3), stating in part:

> [T]he Court's going to … find that [respondent], by his repeated refusal to, or ongoing refusal and previous refusals constitutes, ah, the basis defined in, and in violation of, MCLA 712A.2(a)(3). Not only did he state that he would refuse to go to his father's; he continued, day after day, not to do that, and it wasn't until there was actually a petition filed that he was placed with his father; so, it's the repeated, continuing refusal that brings him within the statutory basis. Obviously, it is a reasonable and lawful command to comply with the order of the court. Ah, he is not in a position to disobey that order.

II. Standard Of Review

Respondent argues in essence that the trial court clearly erred, MCR 2.613(C), by adjudicating respondent to be a delinquent under MCL 712A.2(a)(3); MSA 27.3178(598.2)(a)(3). A lower court's findings of facts are clearly erroneous if a reviewing court has a firm and definite conviction that they are mistaken. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 325; 575 NW2d 324 (1998).

III. Repeated Disobedience

MCL 712A.2(a)(3); MSA 27.3178(598.2)(a)(3) provides the family court with jurisdiction in a case in which:

> The juvenile is repeatedly disobedient to the reasonable and lawful commands of his or her parents, guardian, or custodian and the court finds on the record by clear and convincing evidence that court-accessed services are necessary.

In considering this statutory provision, we are mindful that "[i]f statutory language is clear and unambiguous, the Legislature must have intended the meaning it expressed, and the statute must be enforced as written." *People v Venticinque*, 459 Mich 90, 99; 586 NW2d 732 (1998).

We find that the evidence presented did not justify a finding that respondent had been *repeatedly* disobedient to the reasonable and lawful commands of his father. Rather, considered reasonably, petitioner's case involved an allegation of only a *single incident* of disobedience by respondent with regard to respondent's alleged failure to submit to being in his father's physical custody as of July 24, 1998. In this regard, accepting Cranham's testimony that respondent told him he would not comply with the requirement of the circuit court order that he be in his father's physical custody as of that date, such statements by respondent to Cranham obviously did not in themselves constitute disobedience by respondent to his father, but only at most an expression of a future intent to be disobedient. The plain language of MCL 712A.2(a)(3); MSA 27.3178(598.2)(a)(3) requires that a juvenile be "repeatedly disobedient" to the reasonable and lawful commands of a parent, guardian or custodian in order to be adjudicated a delinquent under that provision. Because this case involved only a single instance of alleged disobedience[3], the trial court clearly erred by adjudicating respondent to be a delinquent under MCL 712A.2(a)(3); MSA 27.3178(598.2)(a)(3).

IV. Conclusion

We conclude that the trial court clearly erred by adjudicating respondent to be a delinquent under MCL 712A.2(a)(3); MSA 27.3178(598.2)(a)(3) because the charge that respondent was "repeatedly disobedient" was unsubstantiated by the evidence presented at the delinquency proceeding.[4]

Reversed and remanded for entry of a judgment acquitting respondent of the juvenile delinquency charge at issue and dismissing the underlying petition.[5] We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Stephen J. Markman

[1] Respondent is now eleven-years-old.

[2] Respondent's father indicated that he accepted a calculation by respondent's mother of July 24, 1998 as the date that respondent should return to his physical custody.

[3] We do note the following colloquy between the prosecutor and respondent's father at the hearing:

> Q. Um, as to this issue of returning to you, what, if ever, had occurred before. Is this the first time we're talking about this type of problem, or . .
>
> A. No, I had had to call the Sheriff's before to see if they would go get him and bring him home to me.

While this interchange may imply prior circumstances of disobedience by respondent, we conclude that it is simply not sufficiently definitive to justify a finding of repeated disobedience under MCL 712A.2(a)(3); MSA 27.3178(598.2)(a)(3). In particular, we note the following colloquy with respondent's father on cross-examination:

> Q. Okay, were there any other times, ah . . . that he told you, I'm not coming back to you, or anything like that?
>
> A. No, not that I can remember, no.
>
> Q. Okay, and, of course, the time that he told you that he wasn't coming back, the only time in fact, that was, that was on a weekend visitation.
>
> A. Right.
>
> * * *
>
> Q. Alright, and what you wanted him to do, you told, you told [respondent] that, "You will come live with me."
>
> A. Yah, that he will follow the court order, yah.
>
> Q. You told that to him once?
>
> A. Oh, no, we discussed that more than that, um, that's what the court order says he'll do.

Q. But, that was before the date that the court order become effective, is that correct? You know, the date, he was supposed to be there on the 24th.

A. Right.

Q. Yah.

A. Right.

[4] As we noted above, the trial court stated that, "Not only did he [respondent] state that he would refuse to go to his father's; *he continued, day after day, not to do that*, and it wasn't until there was actually a petition filed that he was placed with his father; so it's the repeated, continuing refusal that brings him within the statutory basis." [Emphasis supplied.] We have searched for support within the record for the statement that respondent continued "day after day" to refuse to go to his father's residence; we have been unable to find such support.

[5] Our dissenting colleague states that the record "indicates not just one incident of disobedience but rather a troubling pattern that eventually required court intervention." As stated above, we have searched the record for evidence that would support such a conclusion. Other than the delphic reference by the father to calling the Sheriff's office—a reference that the father later contradicted on cross-examination—there is none. Our dissenting colleague further states that, "The majority here draws a thin line between being repeatedly disobedient to a 'parent [], guardian, or custodian,' MCL 712A.2(a)(3); MSA 27.3178(598.2)(a)(3) and violating a court order by resisting efforts on the part of a parent and a guardian ad litem to enforce it." MCL 712A.2(a)(3); MSA 27.178(598.2)(a)(3) gives the family court jurisdiction to make a finding of juvenile delinquency not on the grounds of violating of a court order but on the grounds that the juvenile is repeatedly disobedient to the reasonable and lawful commands of his or her parents, guardian, or custodian. There are remedies for the violation of a court order; a finding of juvenile delinquency under MCL 712A.2(a)(3); MSA 27.178(598.2)(a)(3) is not one of them. We do not view the distinction as a "thin line." Overall, the effect of our dissenting colleague's view would be to read the word "repeatedly" out of MCL 712A.2(a)(3); MSA 27.178(598.2)(a)(3). Amending a statute is a task to be undertaken by the Legislature, not by this Court. If this is "dogged literalism," so be it.